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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN; and EUGENE GLOVER, WILLIAM WINPISINGER and GEORGE POULIN as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN,

Petitioners,

v.

EDWARD SHAW, Individually and On Behalf of All Other Persons Similarly Situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, in the administration of the Employee Retirement Income Security Act of 1974 (ERISA), a pension plan provision which provides for conditional increases in a retiree's normal retirement benefit, after retirement commences, is to be viewed as an "accrued benefit"?

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v.

EDWARD SHAW, Individually and On Behalf of All Other Persons Similarly Situated,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, the International Association of Machinists and Aerospace Workers Pension Plan (hereinafter referred to as the "IAM Pension Plan" or the "Plan") and Eugene Glover, William Winpisinger and George Poulin as fiduciaries and trustees of the IAM Pension Plan (hereinafter referred to as the "Trustees"), respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 11, 1985.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 750 F.2d 1458 and also appears in the Appendix hereto. The opinion of the District Court for the Central District of California is reported at 563 F.Supp. 653.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered on January 11, 1985. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29, Employee Retirement Income Security Act ("ERISA") § 1054(g), ERISA § 204(g):

> The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 302(c)(8).

ERISA § 302(c)(8), 29 U.S.C. § 1082(c)(8), provides, in part, as follows:

> . . . No amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary notifying him of such amendment and the Secretary has approved such amendment or, within 90 days after the date on which such notice was filed, failed to disapprove such amendment. No amendment described in this subsection shall be approved by the Secretary unless he determines that such amendment is necessary because of a substantial business hardship (as determined under section 303(b)) and that waiver under section 303(a) is unavailable or inadequate.

ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A), provides:

> The term "accrued benefits" means—(A) in the case of a defined benefit plan, the individual's accrued benefits determined under the plan and, except as provided in Section 204(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age.

STATEMENT OF THE CASE

Respondent Edward Shaw (hereinafter "Shaw") filed this action in order to prevent the IAM Pension Plan and its Trustees from applying a Plan amendment that was designed to save the Plan and its sponsor from financial disaster.

The IAM Pension Plan provides pension benefits to officers and employees of the International Association of Machinists and Aerospace Workers (hereinafter the "IAM") and its affiliated district and local lodges. The Plan (which today is a single plan resulting from the merger of three separate plans) had its genesis in various amendments to the IAM Constitution, starting in 1940. From the Plan's creation until 1976 it contained a provision, commonly referred to as the "living pension" feature, which provided for post-retirement benefit adjustments. The "living pension" feature provided for benefit increases, *after retirement*, in the same percentages as subsequent salary increases in the retirees' former positions.[1] This provision was, when adopted, felt to be reasonable and affordable. However, the unprecedented inflation rates of the 1960s and 1970s raised the cost of the post-retirement increases to such an extent that the solvency of the Plan and of the IAM itself were placed in serious jeopardy. The unfunded liability of the Plan (i.e., that liability not supported by present plan assets) had increased from $12,800,000 in 1967, to $40,800,000 in 1972, and to $77,100,000 in 1975 and was expected to grow larger in future years. It was estimated that the annual

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[1] The text of the provision is set out on pages 11-12, *infra*.

cost to the IAM of amortizing this liability might be as much as 40% of its payroll and, in the opinion of the officers, the Union could not afford this level of payment and still achieve its organizational objectives. To remedy the situation, the IAM Pension Plan's actuaries recommended a number of Plan changes including a Plan amendment phasing out the "living pension" feature. In 1976, the delegates to an IAM Constitutional Convention voted to adopt the changes, including the phase-out amendment. The amendment, which became effective January 1, 1977, was applied to existing retirees, as well as future retirees. However, no existing retiree suffered any diminution of the benefits then being paid to him. Only future post-retirement benefit increases were phased out.[2] On two subsequent occasions the text of the Plan, including the language phasing out the "living pension" feature, was submitted to the Internal Revenue Service, with requests for favorable determination letters. On February 10, 1978, and again on March 12, 1978, the Internal Revenue Service issued favorable determination letters.

Shaw, a Plan participant who had retired in January, 1975, brought this action against the IAM Pension Plan and its Trustees in the United States District Court for the Central District of California, claiming that the Plan amendment violated ERISA. The District Court concluded that the Plan amendment, as applied to retirees who were on the rolls when the amendment became effective, violated ERISA § 204(g) because it decreased an "accrued benefit" and had not been approved by the Secretary of the Treasury pursuant to ERISA § 302(c)(8). 563 F. Supp. 653, 655-57. The District Court ordered a

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[2] The phase out formula provided that the full percentage adjustment would be paid to retirees in 1977 and 1978 and, thereafter, the adjustments would be: 1979 and 1980—75% of usual adjustment; 1981 and 1982—50% of usual adjustment; 1983 and 1984—25% of usual adjustment; after December 31, 1984—no further adjustment.

restoration of the "living pension" feature, and a retroactive payment of benefit adjustments, for the existing retirees.

The IAM Pension Plan and its Trustees appealed the District Court's decision to the Ninth Circuit on the ground that ERISA § 204(g) was not violated by the Plan amendment because the "living pension" feature was not an "accrued benefit" within the meaning of that section. The Plan and its Trustees also urged the Ninth Circuit to hold that ERISA §§ 204(g) and 302(c)(8) were not in effect, as to this Plan, in 1976. Shaw cross-appealed on the issue of whether pre-judgment interest should have been awarded.[3]

In its opinion of January 11, 1985, the Ninth Circuit held that the ERISA provisions were applicable to the IAM Pension Plan in 1976. 750 F.2d 1458, 1463. It also held that the post-retirement "living pension" feature was an "accrued benefit" within the meaning of ERISA and could not be taken away except upon the approval of the Secretary of Treasury. In analyzing this issue, the Court stated that the "plain language of ERISA provides little help in determining whether the living pension feature is an accrued benefit or not." The Court observed, however, that the legislative history of ERISA describes "accrued benefits" as being distinguishable from "ancillary" or "non accrued" benefits, such as medical or life insurance, early retirement benefits, social security

[3] Shaw also cross-appealed the District Court's rejection of claims that the Plan amendment was a breach of the Trustees' fiduciary duty and a breach of contract. Shaw also appealed the Court's refusal to permit a post-judgment amendment of his complaint to add the IAM itself as an additional defendant. At the suggestion of the Ninth Circuit's Conference Attorney, the parties stipulated that the appeal to the Ninth Circuit would be initially limited to three issues: (1) whether the "living pension" feature was an "accrued benefit"; (2) whether ERISA § 204(g) applied to the IAM Pension Plan in 1976; and (3) the pre-judgment interest.

supplements, and joint and survivor annuities. The Court was of the view that the "living pension" feature did not fit within these "ancillary" categories and, therefore, should be considered an "accrued benefit." The Court also concluded that inasmuch as the "living pension" provision was incorporated in the text of the Plan, and operated to provide adjustments in the normal retirement benefit, it, therefore, became an "accrued benefit." 750 F.2d 1458, 1463-65. The District Court judgment was affirmed. 750 F.2d 1458, 1466.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit's Decision Involves an Erroneous Interpretation of an Important Provision of ERISA Which Will Have a Pervasive Detrimental Effect on Pension Plan Administration

The difference between "accrued benefits," and "ancillary" (or "non accrued") benefits, as developed in ERISA, is extremely important in the funding and administration of private pension plans. This is so because the term "accrued benefits" describes the amount of pension benefits received by a vested employee. The vesting and antiforfeiture provisions of ERISA only apply to such benefits as are accrued. All benefits that do not come within the concept of "accrued benefits" are viewed as "ancillary," and are not subject to the accrual and vesting rules of ERISA. The Ninth Circuit has distorted and expanded ERISA's definition of "accrued benefits." By concluding that a Plan provision for *post-retirement* benefit increases is an "accrued benefit," the Ninth Circuit unjustifiably expanded that concept and narrowed the concept of "ancillary benefits" (see Part 2 hereof).

The Ninth Circuit's broad interpretation of "accrued benefits" is clearly erroneous. Unless reversed, the opinion below will have a devastating financial impact on the IAM Pension Plan and its sponsor. It will also lay the groundwork for similar undermining of the funding and administration of other plans. Pension plans which have

heretofore provided what were considered to be ancillary benefits, capable of being adjusted or cancelled as financial circumstances warranted, may now be ordered to treat such benefits as inviolate. Pension plans which are considering the providing of such benefits will likely decide not to do so. Thus, the Ninth Circuit's decision will adversely affect a matter of significant public importance—the continued availability of ancillary benefits to millions of private pension plan participants. The potential impact of the decision on the private pension plan system warrants this Court's review.[4]

A. The Decision Below Will Have a Devastating Financial Impact on the IAM Pension Plan

As the Ninth Circuit acknowledged, the restoration of the "living pension" feature to Shaw and the other retirees will add approximately $25,000,000 of additional unfunded liabilities to the IAM Pension Plan and will require an additional annual contribution of $1,800,000. 750 F.2d 1458, 1465. These costs could be substantially increased if the rate of inflation and the concomitant increase in salaries should again advance as it did in the 1970s. The impact of this obligation cannot be overstated.[5] The ability of the IAM to continue to fund the IAM Pension Plan is now placed in question.[6]

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[4] See e.g., *United States v. Zazove*, 334 U.S. 602, 613-614, n.17 (1948); *Alaska v. American Can Co.*, 358 U.S. 224, 225 (1959); and *United States v. Chicago, B. & Q. R. Co.*, 412 U.S. 401, 404 (1973).

[5] As of the time of the District Court proceeding, the most recent actuarial valuation of the Plan was one dated January 1, 1982. That valuation indicated that the amended Plan had total liabilities of $246,968,000, against which there were assets of $77,888,100, an estimate of the present value of future normal costs of $72,056,500, and unfunded liabilities of $97,023,400.

[6] The Court below suggested that the IAM could pursue the "statutory escape valve," provided in ERISA Sec. 302(c)(8), 29 U.S.C. § 1082(c)(8), which permits the Secretary of the Treasury

B. The Decision Below Will Also Have a Detrimental Effect on Pension Plan Administration Generally

The Ninth Circuit's broad interpretation of "accrued benefits" not only has a crippling impact on the IAM Pension Plan, but it is likely to have a similar negative effect upon pension plans generally.

In addition to the normal retirement benefits that are subject to ERISA's strict accrual and vesting rules, pension plans typically provide a variety of ancillary (or non accrued) benefits to their participants and beneficiaries. Such benefits have included:

- Medical insurance
- Life insurance
- Death benefits
- Severance benefits
- Pre-retirement counseling
- Supplemental benefits to encourage retirement
- Early retirement benefit options
- Supplemental benefits pending receipt of social security benefits
- Joint and survivor benefit options
- Lump sum cash out options
- Supplemental post-retirement benefits
- Subsidized residential or vacation housing

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to approve plan amendments which reduce accrued benefits upon a showing of business hardship, as a potential solution to the Plan's funding difficulties. 750 F.2d 1458, 1465. The suggestion begs the basic question. A petition to the Secretary of Treasury is not available, or appropriate, unless a plan amendment operates to reduce "accrued benefits." The amendment at issue does not fall within that concept. (See Part 2).

The above list is not exhaustive. Plan sponsors have been exceedingly creative in identifying and providing new forms of ancillary benefits.[7] Such benefits are created or provided when the plan sponsor determines that they are feasible and affordable. They are generally financed on a pay as you go basis. Pension plans are not, however, prohibited from reducing or eliminating ancillary benefits when circumstances change (inflation, recession, industry shrinkage, change in technology, etc.).

The Ninth Circuit's decision, if not reversed, will create confusion in the ranks of pension plan sponsors, administrators and trustees as to the distinction between accrued and ancillary benefits. Some benefits, previously adopted and paid for as ancillary, may now be redefined by federal courts as accrued. Plans may now be required to continually fund benefits that they did not view, at the time of adoption, as being permanent. This may lead to financial difficulty for many plans.

The confusion resulting from the decision will also discourage plans from continuing to provide such benefits to new plan entrants or from adopting new ancillary benefit programs in the future. This will be to the detriment of plan participants and beneficiaries.

2. The Ninth Circuit's Interpretation of "Accrued Benefit" is Clearly Erroneous

The Ninth Circuit's interpretation of "accrued benefit" is at odds with the plain meaning of ERISA, the applicable legislative history, and the overall statutory scheme crafted by Congress. It is clearly erroneous.

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[7] The flexibility afforded plan sponsors in this area has been narrowed in recent legislation. As part of the Retirement Equity Act (Pub. L. 98-397, signed into law on August 23, 1984), Congress amended ERISA § 204(g) to provide that certain retirement type subsidies, or options, will now be treated as "accrued benefits." The definitions are to be spelled out in regulations of the Secretary of Treasury.

A. The Decision Below Misapplies the Definition of "Accrued Benefit" Under ERISA

In determining that the "living pension" feature of the IAM Pension Plan was an ERISA "accrued benefit," the Ninth Circuit incorrectly stated that the statutory definition of the term was of "little help." In fact, the definition is clear and dispositive.

The definition in question is found in ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A):

> The term "accrued benefits" means—(A) in the case of a defined benefit plan, the individual's accrued benefits determined under the plan and, except as provided in Section 204(c)(3) of this title, *expressed in the form of an annual benefit commencing at normal retirement age.* (Emphasis added.)

A post-retirement benefit adjustment simply cannot be regarded as a "benefit commencing at normal retirement age."

The Court focused on the phrase "the individual's accrued benefit determined under the plan" and concluded that inasmuch as the terms of the IAM Pension Plan included references to the living pension adjustments, such adjustments were "accrued benefits." 750 F.2d 1458, 1464-1465. It was error for the Court to ignore the last phrase in the definition. Nowhere in the Ninth Circuit's opinion is the last phrase even acknowledged.

The "living pension" feature of the IAM Pension Plan was not an "accrued benefit" because, even though mentioned in the Plan, it was never expressed in the form of an annual benefit commencing at normal retirement age.

The Ninth Circuit sought to justify its treatment of the "living pension" feature as an "accrued benefit" by finding that the normal retirement benefits, and post-retirement increases, were all part of a unitary formula. This was not the case. When Shaw retired, the Pension

Plan described "the form of (his) annual benefit commencing at normal retirement age" as follows:

> Sec. 7. The pension payable monthly to a retiring eligible person pursuant to the provisions of this Art. (after December 31, 1968) shall be the following percentage of his current monthly salary immediately prior to his retirement date or his 65th birthday, whichever is sooner: (a) 2.5% for each completed year of recognized service, up to a maximum of 50%, for any pension commencing after attainment of age 60 or for any disability pension; and (b) for any pension (other than for disability) commencing after attainment of age 55 but before attainment of age 60, the above amount, reduced by 4/10ths of 1% for each full month by which the eligible person is younger than age 60 when his pension payments commence. In the event that a person's salary changes in the period immediately preceding his retirement, the administrators shall have the right to determine the bona fide salary which was paid prior to the retirement and it shall be relied upon in determining his pension.

The "living pension" feature of the Pension Plan *was not* part of Shaw's "annual benefit commencing at (his) normal retirement age." That feature was contained in a *separate distinct* paragraph in the Plan and, by its own words, was not to take effect until *after* retirement *had* commenced. The paragraph concerning the "living pension" feature read as follows:

> Pensions being paid to persons previously retired under this Art. shall be adjusted by applying the appropriate foregoing percentage to the salaries for positions corresponding to those in which they were employed immediately prior to their retirement, provided, however, that in no case shall such adjustment be made on a retroactive basis, nor increase any benefit to a survivor or beneficiary then being paid. Effective January 1, 1973, neither shall any such adjustment result in a pension payment which

is less than the amount paid to the retiree at the time of retirement.

Clearly, the terms of the Pension Plan do not encompass post-retirement adjustments within the description of the "annual benefit commencing at normal retirement ing).[9]

The emphasis in ERISA § 3(23)(A) on the "annual benefit commencing at normal retirement age" is fully consistent with the ERISA benefit accrual rules.

Benefit accrual is related to, but distinct from, the concept of vesting. Vesting refers to whether or not a participant in a pension plan is entitled to a pension benefit. A participant has a vested right to receive a benefit if he or she has completed sufficient years of credited service under one of three rules set forth in ERISA § 203(a)(2), 29 U.S.C. § 1053(a)(2). Thus, vesting refers to whether or not a pension is payable. Accrual of benefits, on the other hand, refers to the size, or amount, of a vested pension. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510, n. 6, 512, n. 9, 513 (1981).

ERISA establishes rules which require that a participant be entitled, after each year of credited service, to a specific portion of a total benefit to which he or she would ultimately be entitled at *normal retirement age* (assuming continuous plan participation and full vesting).[9]

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[8] The language of the Pension Plan booklet is even more distinctive than the Constitution provisions. The normal retirement benefit (i.e., the annual benefit commencing at normal retirement age) is explained in the first paragraph on page 5. The living pension feature is separately described, four paragraphs later, on page 6. (Pension Plan booklet, pp. 5-6).

[9] ERISA provides three methods for determining a participant's accrued benefit in a defined benefit plan. The first rule provides that for each year of participation, up to 33⅓ years, an employee must accrue at least 3% of *the normal retirement benefits* to which

This view of the accrual rules was adopted by this Court in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981):

> ERISA prescribes vesting and accrual schedules, assuring that employees obtain rights to at least portions of their *normal pension benefits* even if they leave their position prior to *retirement* (emphasis added).

Following this Court's guidance, federal courts considering the meaning of "accrued benefits" under ERISA have similarly adopted a narrow interpretation. See e.g. *Zwissler v. Administrative Committee of the Kaiser Steel Retirement Plan*, No. C-81-3282 EFL (N.D. Calif. 1983) (unreported) (lump sum cash out option held not to be an accrued benefit); *Employee Benefits Committee of Hawaiian Telephone Co. v. Pascoe*, 504 F. Supp. 958 (D. Haw. 1980) (disability retirement benefits payable prior to normal retirement age held not to be part of an accrued benefit), *rev'd on other grounds*, 679 F.2d 1319 (9th Cir. 1982); *Petrella v. NL Industries*, 529 F. Supp. 1357 (D. N.J. 1982) (early retirement benefits, early retirement options, life insurance and major medical benefits held not to be accrued benefits); *Sutton v. Weirton Steel Division*, 567 F. Supp. 1184 (D. W.V. 1983) (conditional early retirement benefits held not to be accured benefits), *aff'd*, 724 F.2d 406 (4th Cir. 1983). See also *Fine v. Semet*, 699 F.2d 1091 (11th Cir. 1983);

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he would be entitled if he began participation at the earliest possible age of entry and served until age 65 (or the plan's normal retirement age, if earlier). The second rule permits *the normal retirement benefits* to be accrued at an accelerated rate but not in excess of 133⅓% of the accrual rate for the prior year. The third rule permits a plan to provide that the minimum accrued benefit payable on separation from service is a ratable portion of the benefits a participant would get *at normal retirement* if he continued to earn his present salary until that date. ERISA § 204(b)(1)(A), (B) and (C), 29 U.S.C. § 1054(b)(1)(A), (B) and (C).

Pompano v. Michael Schiavone & Sons, Inc., 680 F.2d 911 (2d Cir. 1982) (lump sum arrangement held to be outside ERISA requirements), *cert. denied*, 459 U.S. 1039 (1982).

The "living pension" feature clearly could not, ever, be accumulated as a percentage of a benefit that is payable at normal retirement age. By its very terms, it is quantifiable only after retirement. No participant could have an ERISA accrued right to a "living pension" because the "living pension" was not part of the calculated normal retirement benefit to which the participant became entitled as he or she accumulated years of service with the Plan.[10] In holding otherwise, the decision below substantially rewrites ERISA's concept of benefit accrual.

B. The Decision Below Distorts ERISA's Legislative History

The only pertinent legislative history, House Committee Report 93-807, plainly states that the "term 'accrued benefit' refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits." [11] As examples of ancillary benefits the Committee Report lists medical insurance, life insurance, benefits that begin before retirement age, social security supplements

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[10] It is significant to note, also, that post-retirement benefit adjustments are not such accrued benefits as would be guaranteed by the Pension Benefit Guaranty Corporation in the event of a plan termination. Under ERISA and the PBGC regulations, only "basic benefits" which are being paid at the time of plan termination, will be guaranteed. ERISA § 4022, 29 U.S.C. § 1322; 29 C.F.R. § 2613.1 *et seq.* See also 29 C.F.R. § 2621.1 *et seq.*, which deals with limitations on guaranteed benefits. Section 2621.5 provides that benefit increases which have not been in effect for five years are not guaranteed, and § 2621.2 includes, as an example, "cost of living" increases which are provided for in a pension plan.

[11] H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 60 (1974), reprinted in II ERISA Legislative History at 3180 and also excerpted in the Appendix hereto at page 17a.

paid until a participant begins to receive social security, and the value of joint and survivor annuity benefits that exceed single life annuities. The Committee Report concludes by describing "accrued benefit" in terms of the individual's *normal retirement benefit:*

> Generally, an individual's "accrued benefit" under a defined benefit plan is to be expressed in the form of an annual benefit commencing at normal retirement age. Normal retirement age is the age specified in the plan, which may not be later than age 65 (or, if later, the 10th anniversary of the time the participant commenced participation in the plan). *Id.*

The Court below viewed the Committee's examples of ancillary benefits as creating exclusionary categories and improperly presumed that benefits not specifically excluded must be regarded as accrued. The Court reasoned that the "living pension" feature must be accrued, because it "does not fit within any of the enumerated categories of ancillary or non accrued benefits." This is an illogical view. Nothing in the Committee Report suggests an intent to define "accrued benefit" in terms of what does not qualify as an "ancillary benefit." The suggestion is the opposite. Benefits which do not meet the "accrued benefit" test are to be considered "ancillary."

The Ninth Circuit's illogical view of legislative history is also internally inconsistent. In its opinion, the Court summarized the enumerated ancillary benefits as being those which '(1) "lack the 'primary function . . . (of) providing retirement income" and (2) "are generally provided by succeeding employers." The inconsistency is particularly apparent when one reviews the Court's asserted criteria for ancillary benefits in light of two examples of such benefits set forth in the Committee Report. The Ninth Circuit concedes that social security supplements and joint and survivor annuities are, according to the legislative history, "ancillary" benefits. However,

these benefits plainly do not meet the criteria for ancillary benefits that the Court purported to reason from the legislative history. The social security option is not transferable and it does, of course, supplement retirement income. The same is true for the joint and survivor option.

In fact, the "living pension" feature is very much similar to the social security supplement. Both are conditional in that the amount of the benefit provided through each depends upon economic factors (and post-retirement events) over which neither the Plan nor participants have any meaningful control. For example, inflation greatly increased the cost of the "living pension." Similarly, Congressional action to reduce, increase or freeze social security benefits or to delay the normal retirement age for social security recipients could astronomically increase or decrease the cost of a social security supplement. It is arbitrary and irrational to conclude that the "living pension" feature is an accrued benefit, but a social security supplement is not.

C. The Decision Below is Contrary to the Overall Statutory Scheme of ERISA

ERISA is a complex statute which, while protecting participants' interests, also speaks to the importance of maintaining "the equitable character of . . . plans and their financial soundness." (ERISA § 2, 29 U.S.C. § 1001). Thus, ERISA improved the benefit security of Americans in two ways: it promoted the financial integrity of employee benefit plans and it established rules for protecting the receipt of benefits by individuals. The two approaches were clearly interrelated, since the financial stability of plans ultimately protects the benefits of plan participants.

These two approaches also required considerable balancing, since extensive protection of every plan benefit, including ancillary benefits, could undermine the funding

security of many plans. As this Court has observed, ERISA is a "comprehensive and reticulated statute" in which Congress established many detailed rules to improve the overall pension security of Americans. *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980), *reh. denied*, 448 U.S. 908 (1980). It is important in the statutory scheme, that plans be permitted to make reasonable changes and adjustments in order to insure their financial strength for the benefit of all participants.[12] The participants' expectation of receiving plan benefits is largely illusory if the plan cannot be properly funded.[13] It is not appropriate for Courts to extend or to reduce the scope of ERISA or of individual ERISA provisions.

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[12] Following *Nachman*, both the Second and Eleventh Circuit Courts of Appeals have spoken of the importance of avoiding ERISA interpretations which undercut the "flexibility essential to effective and responsible financial management of the (pension) plan." *Pompano v. Michael Schiavone & Sons, Inc.*, 680 F.2d 911, 914 (2d Cir. 1982), *cert. denied*, 459 U.S. 1039 (1982); *Fine v. Semet*, 699 F.2d 1091, 1094 (11th Cir. 1983). See also *Petrella v. NL Industries, Inc.*, 529 F.Supp. 1357, 1365 (D. N.J. 1982).

[13] Under Title IV of ERISA, §§ 4001-4402, 29 U.S.C. §§ 1301-1461, certain single employer pension plan benefits are guaranteed by the Pension Benefit Guaranty Corporation in the event of a plan failure. However, guaranteed benefits are subject to statutory maximums, which may be less than the benefits promised by the plan. ERISA § 4022, 29 U.S.C. § 1322. The same is also true with respect to benefits payable from a multiemployer plan. Under the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 93-364 (1980), Title IV was amended to provide guaranteed benefits, subject to certain maximums. ERISA § 4022A, 29 U.S.C. § 1322A. Also, it is the responsibility of the trustees of a multiemployer plan in financial difficulty to reduce accrued benefits to the statutory levels. ERISA § 4244A, 29 U.S.C. § 1425. The 1982 Annual Report of the Pension Benefit Guaranty Corporation (PBGC 1983) recites that the agency has taken over some 780 single employer plans which have become insolvent, covering some 106,000 participants (at p. 2). Clearly, it is in the participants' best interest if their private pension plans remain healthy so that benefits can be drawn from the plans rather than through the government guarantee programs.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Unless the Ninth Circuit's decision is reviewed and reversed, the concept of benefit accrual under ERISA will be fundamentally distorted to the significant detriment of pension plan participants and beneficiaries, and the security and stability of pension plan funding and administration will be seriously impaired. The Ninth Circuit's decision has especially damaged the IAM Pension Plan because the decision requires the payment of millions of dollars. Furthermore, the potential impact of the decision below is to discourage pension plans nationwide from continuing to provide ancillary benefits.

Respectfully submitted,

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April 11, 1985

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 83-6443, 83-6458

EDWARD SHAW, individually and on behalf of all other persons similarly situated,
Plaintiff/Appellee, Cross-Appellant,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN; and EUGENE GLOVER, WILLIAM WINPINSINGER and GEORGE POULIN as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS and AEROSPACE WORKERS PENSION PLAN,
Defendants/Appellants, Cross-Appellee.

Argued and Submitted Dec. 6, 1984
Decided Jan. 11, 1985

Appeal from the United States District Court
for the Central District of California

Before SNEED, ANDERSON and FERGUSON, Circuit Judges.

FERGUSON, Circuit Judge:

The International Association of Machinists and Aerospace Workers Pension Plan ("IAM") appeals from the district court's denial of its motion for summary judgment and its granting of plaintiff Shaw's motion for summary judgment. The IAM in this case is in the posture of employer; its pension plan benefited retired IAM officers, organizers and support staff. The IAM plan contained a "living pension" feature that tied the amount of payments to pensioners to the current salary of the job from which the pensioner retired. Thus, as salaries for positions rose, pensions to retirees who formerly held those positions also rose.

Due to the increasing financial strain that this "living pension" feature placed on the fiscal soundness of the plan, the IAM adopted an amendment to the plan that phased out the living pension feature over several years. ERISA, however, provides: "The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than amendment described in section 1082(c)(8) of this title." 29 U.S.C. § 1054(g). The amendment in this case was not one "described in section 1082(c)(8)."

If the limitation on amendments contained in § 1054(g) was effective against the IAM, a labor union, on the date the amendment was adopted, it might render that amendment illegal. One question, therefore, is whether the amendment reduces an "accrued benefit," or simply an ancillary benefit. The other question is whether the limitation on amendments quoted above was effective against the IAM on the date that the IAM plan adopted that amendment.

Shaw also contends that the district court erred in declining to award prejudgment interest. That decision, however, lies within the district court's discretion and its careful balancing of the equities. The court correctly

weighed the financial strain that prejudgment interest would place on the IAM along with other factors, and correctly declined to enhance Shaw's award.

FACTS

The current IAM Pension Plan is an "employee benefit pension plan" as that term is defined in ERISA § 3(2), 29 U.S.C. § 1002(2). It was created in 1980 as the result of a merger of three previously maintained staff pension plans.

The terms of the merged plan are contained in the IAM Constitution and the IAM Pension Plan booklet. The unamended plan calculated monthly pension benefits by multiplying three numbers: 2.5%, times years of credited service, times final monthly salary. In Mr. Shaw's case the completed equation would be: (2.5%) × (10 years) × ($1,732.47 final salary) = $433.12. (Mr. Shaw chose a joint and survivor option, which lowered his monthly benefit to $209.19 but would continue benefits to his spouse upon his death; the calculation of his initial monthly benefit, upon which the joint and survivor option is based, remains the same, however.)

The unamended plan also contained a "living pension" feature that geared increases in the retiree's pension benefits to salary increases in the position the retiree held immediately prior to retirement. The plan accomplished this by substituting the current monthly salary for the retiree's final monthly salary in the above equation. The IAM constitution's own words describe it this way: "Pensions being paid to persons previously retired under this Art. *shall* be adjusted by applying the appropriate foregoing percentage to the salaries for positions corresponding to those in which they were employed immediately prior to their retirement." IAM Constitution, Art. XV, Sec. 7, Computation of Pension, ¶ 2 (emphasis supplied). Thus, the constitution retains the same multiplier —2.5% times years of service—but changes the multipli-

cand and, by using the word "shall," makes this change mandatory.

The IAM's Pension Plan booklet explains this change in similarly mandatory and clear language: "If, after your retirement, the salary for the position you held immediately prior to your retirement is changed, the amount of your pension will be adjusted accordingly." P. 10. The booklet contains sample computations on page 26 in which the multiplicand is simply called "Monthly Pay," but *whose* monthly pay is not specified.

Shaw turned sixty-five in January, 1975. He retired from his job as business representative for District Lodge 710 of Torrance, California. The district court's opinion summarized succinctly the effect of the amendment upon the benefits to which Shaw was previously entitled:

> In September, 1976, the delegates to a quadrennial IAM convention voted to amend the pension plan provisions of the constitution so as to phase out the living pension feature. This phase-out provided that the full percentage adjustment would be paid to retirees in 1977 and 1978, but thereafter, the living pension adjustments would be as follows:
>
> 1979 and 1980—75% of full adjustment
>
> 1981 and 1982—50% of full adjustment
>
> 1983 and 1984—25% of full adjustment.

Shaw v. International Association of Machinists and Aerospace Workers Pension Plan, 563 F.Supp. 653, 654 (C.D. Cal. 1983).

This amendment decreases Shaw's benefits. However, the only amendments subject to ERISA's limitation on amendments—§ 1054(g)—are amendments that decrease "accrued benefits" and that were adopted after the effective date of the limitation. The IAM challenges the district court's decision that (1) the amendments occurred

within ERISA's effective date; and (2) Shaw's pension benefits, including its living pension feature, were accrued, and thus could not be summarily decreased.

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. *Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir.1984). In this case, there are no relevant contested issues of fact with respect to summary judgment; thus, "the panel need only decide whether the substantive law was correctly applied." *Id.* Shaw's cross-appeal of the district court's denial of prejudgment interest is reviewed under the abuse of discretion standard. *See Bricklayers' Pension Trust Fund v. Taiariol*, 671 F.2d 988, 990 (6th Cir. 1982).

DISCUSSION

1. *The Act's Effective Date*

Part 2 of ERISA contains participation and vesting requirements. In this part, 29 U.S.C. § 1054(g) provides: "The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in [29 U.S.C. § 1082(c)(8), contained in Part 3 of ERISA]." Part 2's mandates became effective "in the case of plan years beginning after September 2, 1974." 29 U.S.C. § 1061(a). Therefore, the effective year would be 1975.

Part 3 of ERISA provides funding requirements. This part contains 29 U.S.C. § 1082(c)(8) to which the Part 2's limitation on amendments refers. This section provides a description of the only permissible means of decreasing plan benefits by amendment. Such an amendment will be approved if: "the plan administrator files a notice with the Secretary notifying him of such amendment and the Secretary has approved . . . or . . . failed to disapprove such amendment." Part 3's effective dates

vary. It becomes effective against pension plans for employees of tax-exempt labor organizations (under 26 U.S.C. § 501(c)(5)), such as the IAM, on the earlier of:

> (1) the date on which the second convention of such labor organization held after September 2, 1974, ends or
>
> (2) December 31, 1980.

29 U.S.C. § 1086(e). In this case, that date would be September 10, 1980, the date on which the IAM's second convention after September 2, 1974, ended.

The controverted amendment was adopted at IAM's 1976 convention—in between 1975 and 1980. If Part 3's effective date governs, the amendment could reduce accrued benefits with impunity; if Part 2's effective date governs, no amendment could reduce accrued benefits unless application was made to, and approved by (or not disapproved by), the Secretary.

The IAM argues that the later date governs. It reasons that Part 2's (§ 1054(g)'s) limitation on amendments, because it refers to a permissible amendment process described in Part 3 (§ 1082(c)(8)), must incorporate the latter's deferred effective date. This interpretation is illogical: it makes the first section, the broad prohibition on decreases, superfluous, and makes the second section, the exemption, become the rule. This interpretation also contradicts ERISA's purposes. Part 2's section, 1054(g), protects vesting by prohibiting decreases in accrued benefits in most circumstances. This general declaration comports with ERISA's general concern for protecting workers' vested interests. Part 3's section, 1082(c)(8), describes the procedure for procuring an exception to the general prohibition. It would flout the purpose of ERISA for us to expand the applicability of the exception by making it effective earlier than Congress did. It would also create an unprecedented six-

year window—between 1974 and 1980—within which union plans could unilaterally decrease accrued benefits with impunity. General contract principles precluded such action before ERISA. *See UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 575 n. 14, 102 S.Ct. 1226, 1234 n. 14, 71 L.Ed.2d 419 (1982). As Shaw correctly points out, "It would be ironic indeed if ERISA were interpreted to casually dispense with even this modicum of protection."

The IAM plan also argues that Congress intended that ERISA be interpreted the plan's way. They contend, explicitly, that to achieve consistency between ERISA's Title I (Labor Code) and Title II (Tax Code) amendments, both titles' dates of effectiveness with respect to labor unions should be deferred equally. They also contend, implicitly, that to achieve consistency between ERISA's Labor Code provisions—Part 2, Participation and Vesting, and Part 3, Funding—both Parts' dates of effect with respect to labor unions should be identically extended.

Congress, however, seems to have been conscious of the fact that it adopted staggered and discrepant dates of effectiveness. In fact, a report called all these differences to the attention of House and Senate conferees. Staff of House and Senate Conferees on H.R. 2, 93d Cong., 2d Sess., *Summary of Differences Between the Senate Version and the House Version of H.R. 2 to Provide for Pension Reform, Prepared for the Use of the House and Senate Conferees on H.R. 2, Part One, Participation, Vesting, Funding, Actuaries, Jurisdiction and Portability* at 28 (Comm. Print, May 15, 1974) [hereinafter "Conferees' Report"], *reprinted in* III Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, Legislative History of the Employee Retirement Income Security Act of 1974, 5151 at 5181 [hereinafter "Legislative History"]. This Conferees' Report compared House and Senate versions of

Title I's and Title II's effective dates for Part 2's vesting requirements, and referred specifically to the question of delayed applicability to labor unions, by referring to "Staff Comments" on pp. 10-11. *Id.* The Conferees' Report also compared House and Senate versions of Title I's and Title II's effective dates for Part 3's funding requirements, and noted specifically the potential discrepancy between effective dates for funding and vesting. Conferees' Report at 41, III Legislative History at 5181 and 5194-95. Indeed, the staff commented with respect to funding: "Some of the staff believe the effective dates for funding should be the same as for vesting, and others believe (if an early effective date is chosen for vesting) that the effective dates for funding should be later than for vesting." Conferees' Report at 42, III Legislative History at 5195 (parenthesis in original). And, referring to vesting and participation, the staff commented: "The conferees may wish in the case of plans maintained by tax-exempt labor organizations to apply new standards [at a later date]." Conferees' Report at 11, III Legislative History at 5164. Congress responded by adopting only a limited deferment of applicability to labor unions —for the Labor Code's funding requirements, but not its vesting requirements. Its seemingly discordant effective dates thus seem to reflect conscious choices.

Shaw argues that § 1054(g)'s limitation on amendments is almost absolute, excepting only the cross-referenced procedure of applying to, and securing the approval of, the Secretary. Absent compliance with the cross-referenced procedure, Shaw argues, no amendments may decrease benefits. Despite the delayed applicability of this procedure to labor unions, the earlier applicability of the general, substantive prohibition governs. To rule otherwise would effectively repeal § 1054(g)'s general, substantive mandate against decreasing accrued benefits, and leave available only § 1082(c)(8)'s allowance of decreasing accrued benefits through later amendments.

The legislative history is illuminating on this point. The bills that were to become ERISA originally contained no distinction between the dates of effectiveness for vesting and funding provisions or with respect to labor unions and other plans. *E.g.*, S. 4, 93d Cong., 1st Sess. § 701 (1973), *reprinted in* I Legislative History at 189. Deferred applicability of participation and funding provisions to labor organizations began to appear later. *See* H.R.Rep. No. 93-779, 93d Cong., 2d Sess. 51, 100 (1974), *reprinted in* II Legislative History at 2640, 2689. The legislature was aware that discrepancies appeared in the effective dates for different Parts, but it tolerated later effective dates "in the case of plans in existence on January 1, 1974, in order to afford such plans adequate opportunity to adopt any amendments needed in order to conform to the new requirements resulting from this bill." Committee on Education and Labor, Employee Benefit Security Act of 1974: Material Explaining H.R. 12906 Together with Supplemental Views, *reprinted in* II Legislative History 3293 at 3334. The legislature even contemplated a means for resolving some seeming discrepancies:

> Where a qualified plan does not meet the funding requirements of existing law because of vesting or participation requirements made applicable by the substitute and where the funding requirements of the conference substitute do not become applicable until a later time than the vesting or participation requirements, then to the extent that failure to meet the funding requirements of existing law is attributable to these new vesting or participation requirements, no plan is to be disqualified in this interim period on the grounds of underfunding.

H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 294 (1974), U.S. Code Cong. & Admin. News 1974, pp. 4639, 5074, *reprinted in* III Legislative History 4277 at 4561. We have the opposite problem here: not underfunding, but

"undervesting"—failure to meet the vesting section's mandates. But the IAM's failure is not attributable to the potentially exculpatory effect of its striving to meet funding requirements. No funding requirement demanded contravention of the vesting requirement regarding diminution of accrued benefits. In the absence of such a conflicting, and thus potentially exculpatory, mandate, the vesting section's provisions are effective and absolute.

Congress chose to defer applicability of ERISA's funding provisions to labor unions, but not to deter ERISA's vesting provisions. ERISA's limitation on decreasing accrued benefits by amendment was thus effective in 1975, one year before the IAM adopted its take-away amendment.

II. *The living pension feature is an "accrued benefit" within the meaning of ERISA and thus subject to ERISA's limitation on amendments decreasing accrued benefits.*

ERISA provides: "The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 302(c)(8) [29 U.S.C. § 1082(c)(8)]." 29 U.S.C. § 1054(g). Shaw and the IAM disagree over whether the living pension feature is an accrued benefit within the meaning of this section. If the feature were an accrued benefit, it would be subject to the limitations on decrease of benefits through plan amendment for which this section, and the cross-referenced section, provide; if the feature were not an accrued benefit, then it is subject to no such limitation.

The plain language of ERISA provides little help in determining whether the living pension feature is an accrued benefit or not:

> The term "accrued benefit" means . . . in the case of a defined benefit plan, the individuals's accrued

> benefit determined under the plan and, except as provided in section 1054(c)(3), expressed in the form of an annual benefit commencing at normal retirement age . . . .

29 U.S.C. § 1002(23). Thus, ERISA's language provides only two sources for defining "accrued": (1) a tautological reference to the individual's accrued benefit; and (2) a somewhat more enlightening reference to the plan. Before turning to the plan itself, we turn to other sources of guidance.

ERISA's history provides a little more help. It, too, defers to the private employer's plan, "subject to certain requirements." H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 60 (1974), *reprinted in* II Legislative History at 3180. It describes benefits that are considered accrued. This category includes pension or retirement benefits, and the types of benefits that are not generally transferable when employees move on to new jobs. It distinguishes these from ancillary benefits, such as medical or life insurance. Benefits in this latter category lack the "primary function . . . [of] provid[ing] retirement income"; are generally provided by succeeding employers. Also, accrued benefits do not include

> such items as the value of the right to receive benefits commencing at an age before normal retirement age, or so-called social security supplements which are commonly paid in the case of early retirement but then cease when the retiree attains the age at which he becomes entitled to receive current social security benefits, or any value in a plan's joint and survivor annuity provisions to the extent that exceeds the value of what the participant would be entitled to receive under a single life annuity.

Id., U.S. Code Cong. & Admin. News 1974, p. 4726.

The living pension feature fits more easily within the enumeration of accrued benefits. The feature is a "pen-

sion or retirement benefit[]"; it primarily provides retirement income; and it is not generally transferable from one employer to another. The living pension feature does not fit within any of the enumerated categories of ancillary or nonaccrued benefits. Aside from these categories, "the accrued benefit is to be determined under the plan." H.R. Rep. No. 93-1280, 93d Cong., 2d Sess. 273 (1974), U.S. Code Cong. & Admin. News 1974, p. 5054, *reprinted in* III Legislative History 4277 at 4540.

The case law also categorizes various benefits as either vested or ancillary. No case, however, deals with the narrow issue of post-retirement upward adjustments like the living pension provision. The categories defined by the case law parallel those enumerated in the legislative history. In *Sutton v. Weirton Steel Division of National Steel Corp.*, 567 F.Supp. 1184 (W. Va. 1983), *aff'd* 724 F.2d 406 (4th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984), for example, the district court held:

> An examination of the eligibility requirements for 70/80 and rule of 65 retirement reveals they are conditional and in the nature of early retirement benefits and cannot be considered nonforfeitable or as an accrued benefit. . . . Since the increased $400.00 per monthly pension is conditioned upon eligibility for 70/80 or rule of 65 retirement, it cannot be considered nonforfeitable.

Id. at 1196. The living pension feature, in contrast, is not "in the nature of early retirement benefits." Nor is it "conditional": the Constitution provides for the adjustment in mandatory language, to be measured by an occurrence wholly outside the pensioner's control. The *Sutton* court used the legislative history as a guide, but it made its determination based on the terms of the plan itself.

On appeal, the court added the term "unfunded" to describe the typical unaccrued, contingent early retire-

ment benefit. 724 F.2d at 409. This bolstered further the district court's decision that the unfunded early retirement benefits at issue in that case were ancillary, rather than funded. The living pension feature in the IAM Plan, in contrast, was included with the rest of the pension funds when the Plan's liabilities were computed.

Similarly, in *Petrella v. NL Industries, Inc.*, 529 F. Supp. 1357 (D. N.J. 1982), the court recited the difference between ancillary and accrued benefits under ERISA and decided that the benefits before it were not accrued. *Id.* at 1366. This case squeezed into the ancillary category five plans: two early retirement plans; a plan providing supplemental benefits to retirees until the age of 65; a level income option that pays higher monthly benefits to start, and then decreases payments after the retiree is eligible for social security to make up the difference; and life insurance and major medical benefits. This case provided no new indices of difference between accrued and ancillary. The benefits in *Petrella* paralleled those listed in ERISA as ancillary: early retirement, life insurance and medical plans. The living pension feature, in contrast, parallels none of ERISA's list of ancillary or nonaccrued benefits. And, again, the *Petrella* court looked to the terms of the plan to determine into which camp its benefits fell.

The terms of the IAM Plan support our conclusion that Shaw's living pension benefits were accrued. The plan takes explicit form in the IAM Constitution and the IAM Pension Plan booklet. In the Constitution, the monthly pension benefit is described in terms of a formula. The formula contains three numbers: years of service, the 2.5% rate, and the salary by which the product of these two numbers is to be multiplied. In paragraph one of Section 7, the salary is described as the participant's "current monthly salary immediately prior to his retirement date." In paragraph two of that section, the salary is described as "the salaries for positions corresponding

to those in which they were employed immediately prior to their retirement . . . ." Thus, the living pension "adjust[s]" the basic formula for determining benefits at normal retirement, rather than providing a separate, unfunded, optional plan like medical coverage or early retirement. It describes the multiplicand; it does not provide a separate formula or benefit. When the pension plan booklet shows exemplary pension benefit computations, it shows the "salary" figure as a multiplicand; it shows no separate formula or benefit to be added. *Cf. In re W.S. Dickey Clay Manufacturing*, 720 F.2d 25, 27 (10th Cir. 1983) (even where the terms of the pension plan explicitly retain the power to change the multiplier in the benefit determination formula, the benefits are not forfeitable). The living pension feature was therefore an accrued benefit, just like the rest of Shaw's pension benefits.

The IAM declined to take advantage of the statutory escape valve that allows the Secretary to approve amendments decreasing accrued benefits upon a showing of substantial business hardship. 29 U.S.C. § 1082(c)(8). Perhaps the IAM can now submit its discussion of financial hardship, which is irrelevant to our decision, to the Secretary. We see no time limit on applications brought under that escape valve section.

III. *The district court did not err in declining to award prejudgment interest.*

On cross-appeal, Shaw challenges the district court's decision to deny him prejudgment interest. He asserts that in this case, an award of prejudgment interest is necessary to achieve full compensation.

"Whether interest will be awarded is a question of fairness, lying within the court's sound discretion, to be answered by balancing the equities." *Wessel v. Buhler*, 437 F.2d 279, 284 (9th Cir. 1971). *See also Maxwell v. Lucky Construction Co.*, 545 F.Supp. 213, 215-16 (C.D.

Cal. 1982). The district court in this case explicitly balanced the equities:

> [T]he adoption of the pension plan amendment . . . was not attended to by any consideration of bad faith or ill will. Additionally, the issue on which the court invalidated the amendment (i.e., failure to comply with Section 204(c) of ERISA) is a genuine and complicated issue. Lastly, the restoration of the original "living pension" feature to plaintiff and other retirees similarly situated who retired on or before January 1, 1977, will add approximately $25,000,000 of additional unfunded liabilities to the IAM Pension Plan, and will require an additional annual Union contribution of some $1,800,000. Under the circumstances, the Pension Plan should not be further burdened with the addition of prejudgment interest....

The additional financial strain that an award of prejudgment interest would place on the IAM could injure other beneficiaries of its pension plan. It could also injure the IAM's own members. *Cf. International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50-51, 99 S.Ct. 2121, 2126-2127, 60 L.Ed.2d 698 (1979) (employee not entitled to punitive damages from the union against whom he brought his breach of duty of fair representation claim, because "[s]uch awards could deplete union treasuries, thereby impairing the effectiveness of unions as collective-bargaining agents."). For all these reasons, the district court's decision declining to award prejudgment interest to Shaw was not in error.

CONCLUSION

Congress determined "that despite the enormous growth in . . . [pension] plans many employees with long years of employment are losing *anticipated retirement benefits* owing to the lack of vesting provisions in such plans." 29 U.S.C. § 1001(a) (emphasis supplied). The Supreme

Court has held, "Congress through ERISA wanted to ensure that 'if a worker has been *promised a defined pension benefit* upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—. . . he actually receives it.'" *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510, 101 S.Ct. 1895, 1899, 68 L.Ed.2d 402 (1981) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375, 100 S.Ct. 1723, 1733, 64 L.Ed.2d 354 (1980)) (emphasis supplied). Thus, the material available for interpreting ERISA's definition of "accrual" always refers to the terms of the pension plan itself. It is those terms that raise the "anticipat[ion of] retirement benefits" that Congress sought to protect and the "promised . . . defined pension benefit" that the Supreme Court has sought to protect.

The IAM Plan provided a generous pension to its retired employees. That entire pension benefit—including the living pension feature—was promised, anticipated and accrued. The IAM decreased that accrued benefit by its 1976 amendment. That action occurred after ERISA's vesting requirements already bound labor unions such as the IAM. The IAM's amendment decreasing Shaw's accrued benefit therefore violates 29 U.S.C. § 1054(g).

The judgment of the district court is affirmed.

Excerpt from H.R. Rep. No. 93-807, 93d Cong., 2d Sess. (1974), reprinted in II ERISA Legislative History at 3180-81.

* * * *

Accrued benefits.—Under the committee bill, the vested employee is protected in his rights to all, or a certain percentage, of his "accrued benefit." It is necessary to provide a statutory definition of an "accrued benefit" because, unless this is a defined amount, vesting of an "accrued benefit" in whatever form is specified by the plan has little, if any, meaning. In the case of any retirement plan other than a defined benefit pension plan, under the bill the employee's "accrued benefit" is the balance in his plan account.[9] This would include, for example, a money purchase pension plan, a profit-sharing plan and a stock-bonus plan.

In the case of a defined benefit plan the bill provides that the accrued benefit is to be determined under the plan, subject to certain requirements. The term "accrued benefit" refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, such as medical insurance or life insurance, which are sometimes provided for employees in conjunction with a pension plan, and are sometimes provided separately. To require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income. Also, where the employee moves from one employer to another, the ancillary benefits (which are usually on a contingency basis) would often be provided by the new employer, whereas the new employer normally would not provide pension benefits based on service with the old

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[9] Separate accounting for each employee is required under the committee bill in the case of contributions to a defined contribution plan and for voluntary employee contributions to a defined benefit plan.

employer. Also, the accrued benefit to which the vesting rules apply is not to include such items as the value of the right to receive benefits commencing at an age before normal retirement age, or so-called social security supplements which are commonly paid in the case of early retirement but then cease when the retiree attains the age at which he becomes entitled to receive current social security benefits, or any value in a plan's joint and survivor annuity provisions to the extent that exceeds the value of what the participant would be entitled to receive under a single life annuity.

Generally, an individual's "accrued benefit" under a defined benefit plan is to be expressed in the form of an annual benefit commencing at normal retirement age. Normal retirement age is the age specified in the plan, which may not be later than age 65 (or, if later, the 10th anniversary of the time the participant commenced participation in the plan).